

DKSH Corporate Shared Services Center Sdn Bhd v Matthias Legler A

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL
REVIEW NO R-25-56-04 OF 2015 B
AZIZUL AZMI ADNAN JC
14 APRIL 2016

Labour Law — Industrial Court — Claim for back-wages — Whether Industrial Court wrong to award 24 months' back-wages to dismissed employee who only seven more months to serve under fixed-term employment contract — Whether proper computation of back-wages salary payable for unexpired portion of contract less payments made in lieu of notice of termination — Whether Industrial Court wrong to hold employee's Swiss employer and its Malaysian counterpart were jointly and severally liable as employee's contracts with both parties were distinct and separate C D

The respondent entered into a contract of employment with a Swiss company ('the Swiss contract') which provided that he would be appointed to a vice-presidential position based in Kuala Lumpur which posting would require him to sign another employment contract with the Swiss company's counterpart in Malaysia ('the applicant'). Whilst the Swiss contract was not for a fixed term, the respondent's employment contract with the applicant ('the Malaysian contract') was for three years only. More than two years after he had worked with the applicant, the latter issued him a show-cause letter for alleged misconduct and then terminated his employment 13 days later. The respondent took steps under the Industrial Relations Act 1967 to challenge his dismissal. His dispute was referred to the Industrial Court which ruled he had been dismissed without just cause or excuse. The court ordered the applicant to pay him RM181,440 as compensation in lieu of reinstatement (being two months' salary for completing two years of service) and back-wages for 24 months. At the time of his dismissal the respondent still had seven months and a week to serve under his Malaysian contract. In making its award, the Industrial Court held that as the respondent was employed by both the applicant and the Swiss company, they were jointly and severally liable to him. In the instant proceedings, the applicant sought an order of certiorari to quash the Industrial Court's award. E F G H

Held, allowing the application in part and substituting the 24 months' back-wages award with a sum of RM66,723.12: I

- (1) The Industrial Court did not commit any error of law in holding that the respondent's services had been terminated without just cause or excuse.

- A The award in this regard was upheld. So was the award with respect to compensation in lieu of reinstatement. However, where an employment contract was for a fixed term, the proper computation for back-wages was the salary payable for the unexpired duration of the contract, less payments made in lieu of notice. In this case, the Malaysian contract had
- B seven months and a week to run at the point of termination. The respondent was already paid six months' salary in lieu of notice which meant the amount of back-wages due to be paid was for the period of one month and one week, ie RM111,205.20. After deducting 40% from that figure for the respondent's contributory conduct (there was no reason to
- C disturb this finding of the Industrial Court), the amount of back-wages due to the respondent was RM66,723.12 (see paras 30 & 57–59).
- (2) The Industrial Court committed an error of law in holding the applicant and DKSH Holding were jointly and severally liable to the respondent. The Malaysian and Swiss contracts together did not constitute a single
- D joint promise for joint liability to arise under ss 43 and 44 of the Contracts Act 1950. Rather, they were separate contracts that contained separate albeit concurrent promises that subsisted at the same time up to the point of termination of the respondent's services. As the applicant was
- E not privy to the Swiss contract, it could not be made liable on the basis of a term in the Swiss contract that provided for continuous permanent employment. The respondent might well have been entitled to also claim for wrongful termination under the Swiss contract, but that was not a matter the Industrial Court here was competent to rule on due to the
- F territorial limits of its jurisdiction (see paras 22, 24 & 56).
- (3) The Malaysian contract was for a fixed term of three years. The Swiss contract appeared to provide for continuous permanent employment. Since the instant proceedings were only concerned with the dismissal of the respondent under the Malaysian contract, his back-wages ought to be
- G limited to the unexpired term of the Malaysian contract at the time of the termination of his services, less the amount of salary paid in lieu of notice (see para 29).

[Bahasa Malaysia summary]

- H Responden telah memasuki kontrak pekerjaan dengan sebuah syarikat Swiss ('kontrak Swiss tersebut') yang memperuntukkan bahawa dia akan dilantik kepada jawatan naib presiden yang berpejabat di Kuala Lumpur yang mana penempatan itu menghendakinya menandatangani kontrak pekerjaan lain dengan rakan sejawat syarikat Swiss itu di Malaysia ('pemohon'). Di mana
- I kontrak Swiss tersebut bukan untuk tempoh yang ditetapkan, kontrak pekerjaan responden ('kontrak Malaysia') adalah untuk tiga tahun sahaja. Lebih daripada dua tahun selepas dia telah bekerja dengan pemohon, pemohon telah memberinya surat tunjuk sebab untuk salah laku yang dikatakan itu dan kemudian menamatkan pekerjaannya 13 hari kemudian.

Responden mengambil langkah di bawah Akta Perhubungan Perusahaan 1967 untuk mencabar pemecatannya. Pertikaianya telah dirujuk kepada Mahkamah Perusahaan yang memutuskan telah ditolak tanpa sebab atau alasan yang adil. Mahkamah memerintahkan pemohon untuk membayarnya RM181,440 sebagai pampasan menggantikan pengembalian jawatan (iaitu gaji dua bulan kerana melengkapkan perkhidmatan dua tahun) dan tunggakan gaji untuk 24 bulan. Pada masa pemecatannya responden masih mempunyai tujuh bulan dan seminggu untuk berkhidmat di bawah kontrak Malaysiannya. Dalam membuat awardnya, Mahkamah Perusahaan memutuskan bahawa oleh kerana responden diambil bekerja oleh kedua-dua pemohon dan syarikat Swiss itu, mereka bersesama dan berasingan bertanggungjawab terhadapnya. Dalam prosiding ini, pemohon memohon untuk satu perintah certiorari bagi membatalkan award Mahkamah Perusahaan itu.

Diputuskan, membenarkan sebahagian daripada permohonan dan menggantikan award 24 bulan tunggakan gaji dengan jumlah RM66,732.12:

- (1) Mahkamah Perusahaan tidak melakukan apa-apa kesilapan undang-undang apabila memutuskan bahawa perkhidmatan responden telah ditamatkan tanpa sebab atau alasan yang adil. Award dengan itu dikekalkan. Begitu juga award berkenaan pampasan menggantikan pengembalian jawatan. Walau bagaimanapun, di mana kontrak pekerjaan adalah untuk tempoh yang ditetapkan, pengiraan yang wajar untuk tunggakan gaji adalah gaji yang boleh dibayar untuk jangka masa kontrak yang tidak luput masa, kurang bayaran yang dibuat sebagai ganti notis. Dalam kes ini, kontrak Malaysia itu mempunyai tujuh bulan dan satu minggu lagi untuk berkuat kuasa semasa penamatan. Responden telahpun membayar gaji enam bulan sebagai ganti notis yang bermaksud jumlah tunggakan gaji yang perlu dibayar adalah untuk tempoh satu bulan dan satu minggu, iaitu RM111,205.20. Selepas menolak 40% daripada angka tersebut bagi perlakuan yang menyumbang (tidak terdapat sebab untuk mengganggu penemuan Mahkamah Perusahaan ini), jumlah tunggakan gaji yang perlu dibayar kepada responden adalah RM66,723.12 (lihat perenggan 30 & 57-59).
- (2) Mahkamah Perusahaan telah melakukan kesilapan undang-undang dalam memutuskan pemohon dan DKSH Holding adalah bertanggungjawab secara bersesama dan berasingan kepada responden. Kontrak-kontrak Malaysia dan Swiss bersama tidak merupakan perjanjian bersama yang satu bagi liabiliti bersama untuk timbul di bawah ss 43 dan 44 Akta Kontrak 1950. Sebaliknya, kedua-duanya adalah kontrak berasingan yang mengandungi berasingan walaupun perjanjian-perjanjian serentak yang wujud pada masa yang sama sehingga titik penamatan perkhidmatan responden. Oleh kerana pemohon bukan privi kepada kontrak Swiss tersebut, ia tidak boleh dijadikan bertanggungjawab berdasarkan terma dalam kontrak Swiss

- A tersebut yang memperuntukkan untuk pekerjaan tetap yang berterusan. Responden mungkin juga berhak untuk menuntut penamatan yang salah di bawah kontrak Swiss tersebut, tetapi itu bukan satu perkara yang Mahkamah Perusahaan di sini kompeten untuk membuat keputusan tentangnya disebabkan had wilayah bidang kuasanya (lihat perenggan 22, 24 & 56).
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- (3) Kontrak Malaysia tersebut adalah tempoh yang ditetapkan selama tiga tahun. Kontrak Swiss tersebut dilihat memberikan pekerjaan tetap yang berterusan. Oleh kerana prosiding ini hanya berkaitan pemecatan responden di bawah kontrak Malaysia, tunggakan gajinya patut dihadkan kepada tempoh yang tidak luput kontrak Malaysia tersebut pada masa penamatan perkhidmatannya, kurang jumlah gaji yang dibayar sebagai ganti notis (lihat perenggan 29).]
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D **Notes**

For cases on claim for back wages, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 1762–1764.

Cases referred to

- E *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Chan Lark Sye trading as New Zonic Enterprise v Aye Cho & Anor [2013] 1 LNS 1146, HC (refd)
- F *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170, PC (refd)
Multicore Solders (M) Sdn Bhd v Yeo Kuei Chwan Donny [2012] 1 LNS 935, CA (distd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
- G *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

Legislation referred to

Contracts Act 1950 ss 43, 44

- H Evidence Act 1950 s 8

Industrial Relations Act 1967 ss 20, 20(1), 30(5)

N Sivabalah (Nadia Abu Bakar with him) (Shearn Delamore & Co) for the complainant.

- I *M Nagarajah (Michael Anthony with him) (Shook Lin & Bok) for the respondent.*

Azizul Azmi Adnan JC:

A

INTRODUCTION

[1] The applicant company sought for order of certiorari to quash an award of the Industrial Court decided under s 20 of the Industrial Relations Act 1967.

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BACKGROUND FACTS

[2] On 27 February 2009, the respondent, Mr Matthias Legler, a German national, entered into a contract of employment with DKSH Management Ltd ('DKSH Management'). This company is a Swiss company. Under the terms of this contract ('Swiss contract'), Mr Legler was to be appointed in the position of Vice President IT to be based in Kuala Lumpur with effect from 1 June 2009. The terms of the Swiss contract specifically anticipated that it would be replaced by a local contract to be entered into between Mr Legler and a local DKSH company. The relevant clause bears setting out in full:

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20. Local contract

This contract might be replaced by a new local contract between the local DKSH Company and the Manager ('the Local contract') which will include the provisions of this agreement, but which might to the necessary extent have to be adapted to the needs of the local legislation. The terms and conditions of compensation and benefits package will, however, remain unchanged, also under the Local contract. Simultaneously to signing the Local contract this Agreement will be terminated by mutual written agreement, between the parties hereto.

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[3] Subsequently, Mr Legler and DKSH Corporate Shared Services Center Sdn Bhd, the applicant in the current proceedings, entered into an agreement of employment on 27 April 2009. This agreement, which I will refer to as the ('Malaysian contract'), specified that Mr Legler would be employed for a fixed term of three years at a monthly salary denominated in ringgit. It is noted that the Malaysian contract did not provide for the termination of the Swiss contract, which had specifically provided that it was to be terminated by mutual written agreement, and not automatically upon execution of the Malaysian contract.

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[4] In August 2011, more than two years after he had commenced his employment with the applicant company, Mr Legler expressed his desire to return to Europe in the mid to long term future, and his unhappiness over his remuneration, due to the prevailing weakness of the ringgit against the Swiss franc.

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[5] He did so in the course of several emails and telephone conversations with one Gonpo Tsering, who was a senior executive vice president of the

A holding company of the applicant. In the course of his employment, Mr Legler reported to Mr Tsering. Mr Tsering was referred to as ('COW1') in the proceedings before the Industrial Court, and I adopt its nomenclature for present purposes.

B [6] In response, the applicant commenced discussions with Mr Legler to agree on terms for a mutual separation. While negotiations were ongoing, it was alleged that Mr Legler had said to a Tony Woo ('COW2') that he would make the applicant pay. COW2 was at the material time Mr Legler's immediate subordinate.

C [7] The applicant took this as a threat and suspended Mr Legler effective from 28 September 2011 with full pay for a period of two weeks pending investigation.

D [8] A series of correspondences thereafter ensured, mostly undertaken through the respective solicitors of the parties. On 11 October 2011, the applicant issued a show cause letter to Mr Legler requiring him to explain why his services ought not be terminated on account of what he had purportedly said to COW2. His suspension was extended for a further ten days.

E [9] In a letter dated 14 October 2011, Mr Legler responded by denying that he had said what was alleged and stated that he saw his suspension 'as an arm-twisting tactic' to force him to accept the terms of the proposed settlement.

F [10] On 24 October 2011, the applicant terminated the services of Mr Legler for the reason, inter alia, that his conduct in both making the alleged threat and in alleging an ulterior motive in suspending him made his continued employment in the applicant untenable and that the applicant was no longer able to repose any further trust and confidence in Mr Legler.

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BEFORE THE INDUSTRIAL COURT

H [11] Mr Legler lodged a complaint with the Director General of Industrial Relations under s 20(1) of the Industrial Relations Act 1967. His complaint was eventually referred to the Industrial Court, which held that Mr Legler had been dismissed without just cause and excuse and ordered the applicant to pay backwages calculated based on the maximum period of 24 months' salary and compensation in lieu of reinstatement.

I [12] The following summarises the findings of the learned chairman of the Industrial Court:

- (a) the applicant had failed to satisfy the Industrial Court that Mr Legler had said to COW2 that he would make 'DKSH pay'. The chairman stated that:
- The court will refrain from acting on the sole evidence of COW-2 who is a serving employee who benefited from the dismissal of the Claimant.
- (b) even if such statement had been made, the applicant was wrong to have concluded that such words amounted to a threat to take action against it;
- (c) Mr Legler had been dismissed without just cause and excuse by the applicant;
- (d) Mr Legler was employed jointly by the applicant and DKSH Holding Ltd (referred to DKSH Holding, which was the immediate holding company of the applicant);
- (e) as joint employers, the applicant and DKSH Holding were jointly and severally liable towards Mr Legler; and
- (f) it was the intention of the DKSH Holding, the applicant and Mr Legler that he was to be placed on permanent employment notwithstanding that the Malaysian contract provided for a fixed term of three years. The Industrial Court cited the fact Mr Legler was to have been entitled to shares in the applicant (In fact, however, the employee share incentive scheme related to the shares in DKSH Holdings AG; see p 188 of encl 3) in an initial public offering that would have vested well after the expiry of the three year tenure of the Malaysian contract.

SUMMARY OF THE DECISION OF THIS COURT

[13] I am of the view that the Industrial Court committed an error of law in holding that the applicant and DKSH Holding were jointly and severally liable to Mr Legler. Although Mr Legler may have been employed by two companies simultaneously, each employment was governed under a separate contract of employment, and the application of the principle of privity meant that the applicant could not be made liable for a term under the Swiss contract providing for continuous employment.

[14] It is also my judgment that the learned chairman of the Industrial Court did not commit any error of law in holding that Mr Legler's services had been terminated without just cause and excuse.

[15] Accordingly, I vary the award by quashing the part of the award for backwages for the maximum period of 24 months' salary and substituting therefor the amount of backwages payable based on the salary that Mr Legler would have received for the unexpired term of the Malaysian contract, less

A deductions for payments made in lieu of notice.

[16] The grounds on which the decisions of this court are based are further explained in the following paragraphs.

B ANALYSIS

Who were the employers?

C [17] The first observation that may be made is that there were in fact two different Swiss companies involved. The first was DKSH Management, which was the signatory to the Swiss contract. The second was DKSH Holding, which was the immediate holding company of the applicant.

D [18] In the award, the learned chairman stated:

The evidence shows that the claimant signed employment contracts with the Swiss holding company as well as with the Malaysian company. He reported to COW1 who was the Head of Operations of the Swiss company and all letters leading up to his termination were copied to the Swiss company. His remuneration paid by the
E Malaysian company was in accordance with the terms of his Swiss contract. The company through its witnesses testified the decision to terminate the claimant was at the instructions of DKSH Holding Ltd, the holding company. On these facts the court necessarily agrees with the claimant's counsel that the Swiss holding company and the company were joint employers of the claimant. The company's counsel
F argues that the Malaysian company has been wrongly brought to the court by the claimant. The court disagrees with such a contention as the facts and law supports the conclusion that both were joint employers and in a triangular relationship with the claimant. One cannot deny the fact that the work permit applied for was done by the Malaysian company holding itself out as the employer of the claimant. And
G as joint employers they are jointly and severally liable towards the claimant. (Emphasis added.)

[19] The learned chairman fell into error in conflating the two Swiss companies, as Mr Legler signed the Swiss contract with DKSH Management,
H and not DKSH Holding, the holding company of the applicant.

Joint and several liability

[20] The more serious objection lies with the finding that the applicant and
I DKSH Holding (or DKSH Management, as the case may be) were jointly and severally liable to Mr Legler as his joint employers.

[21] In the present case, there were two contacts of employment signed separately between Mr Legler and DKSH Management and between Mr Legler

and the applicant. It is clear that the Swiss contract anticipated that a contract would be signed between Mr Legler and the local company, and indeed this was what had happened when the Malaysian contract was executed by the applicant. However, the Swiss contract itself also anticipated that it would be terminated upon the signing of the Malaysian contract 'by written mutual agreement' between the parties. There was nothing in evidence to suggest that this was done, and so there were two contracts extant at the material time.

[22] In my judgment, Mr Legler would have been entitled to claim for wrongful termination under the Malaysian contract, pursuant to and in accordance with the provisions of the Industrial Relations Act 1967. He may well also be entitled to claim for wrongful termination under the Swiss contract, but that was not a matter that the Industrial Court was competent to rule on due to the territorial limits of its jurisdiction.

[23] DKSH Management was not a party to the Malaysian contract. Nor was the applicant a party to the Swiss contract. Therefore, even though it may well be that Mr Legler was employed by both DKSH Management and the applicant at the same time, they were not employers under the same contract.

[24] With respect to the learned chairman, to hold that the two employers were jointly and severally liable would be to ignore the principles of privity of contract. The only way in which the employers would have been jointly and severally liable was if they were joint promisees of a joint promise under s 43 of the Contracts Act 1950. In the present instance, the applicant was not a signatory to the Swiss contract. Nor did it sign the Malaysian contract in a dual capacity as both principal and as agent for DKSH Management. There was, in other words, no joint promise, but rather two separate albeit concurrent promises.

[25] The next question is whether these errors in the award were of such a nature as would justify the exercise by this court of its supervisory powers to quash the award.

[26] In this regard, reference may be made to the guiding dicta of Gopal Sri Ram JCA in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748:

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or takes into account irrelevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or mis-applies or mis-states a principle of the general law. Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not

A be immunized from judicial review by an ouster clause however widely drafted.

[27] It is clear in my mind that the learned chairman had misapplied the law in holding that the applicant and DKSH Management (or DKSH Holding for that matter) were jointly and severally liable to Mr Legler. This amounted to an error of law in respect of which certiorari lies.

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[28] The practical significance of the finding that there was two concurrent contracts rather than a single joint contract under which DKSH Management and the applicant were joint promisees is the difference in the duration of the two contracts.

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[29] The Malaysian contract, unlike the Swiss contract, was for a fixed term of three years. The Swiss contract appeared to provide for continuous permanent employment. It follows therefore that since we are only concerned in these proceedings with the dismissal of Mr Legler under the Malaysian contract, his backwages ought to be limited to the unexpired term of the Malaysian contract at the time of the termination of his services, less the amount of salary paid in lieu of notice: see, for example, *Chan Lark Sye trading as New Zonic Enterprise v Aye Cho & Anor* [2013] 1 LNS 1146, a decision of the High Court of Malaya, which has been affirmed by the Court of Appeal.

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[30] It will be seen at paras 34 et seq, post that I have found no grounds to disturb the findings of the Industrial Court that the dismissal of Mr Legler was without just cause and excuse. I accordingly uphold the award with respect to dismissal and compensation in lieu of reinstatement but quash the portion of the award ordering backwages to be paid based on the maximum period of 24 months' salary and substitute for it an award for backwages based on the salary that Mr Legler would have been entitled to under the unexpired term of the Malaysian contract. At the time of its termination, this contract had seven months and a week to run. Mr Legler was paid six months' salary in lieu of notice, which meant that the amount of backwages due to be paid is for the period of one month and one week.

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[31] In the light of the foregoing, it would not be necessary for me to determine whether the error of the Industrial Court in conflating the two Swiss companies amount to an error of law that justifies the setting aside of the award.

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[32] It is appropriate at this juncture to deal with the counter-arguments raised by Mr Nagarajah, counsel for Mr Legler:

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- (a) *s 30(5) of the Industrial Relations Act 1967*. It was posited that this court is under a duty, under s 30(5) of the Industrial Relations Act 1967, to act

according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, and that in acting in accordance with such duty, this court ought to come to the irresistible inference of joint employment.

The short answer to this is that, in applying the principle of substance over form in s 30(5) of the Industrial Relations Act 1967, neither the Industrial Court nor this court is entitled to ignore fundamental principles of substantive law. Even though I accept that the learned chairman may have been correct in holding that Mr Legler was jointly employed by DKSH Management and the applicant (again, putting aside the confusion between the two Swiss entities), to hold that he was jointly employed under a single employment contract would be to disregard the application of the doctrine of privity in contract law, which has been held by the Judicial Committee of the Privy Council as being applicable in Malaysia (see *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170);

- (b) *the governing law of the Swiss contract*. The issue of whether the Malaysian and Swiss contracts formed a joint promise within the meaning of ss 43 and 44 of the Contracts Act 1950 has been addressed in paras 20 to 24, ante. It was further submitted that the fact that the Swiss contract had specified Malaysian law as its governing law was ‘an implicit recognition by the Swiss company that in the event of any dispute, it is the Malaysian company that would be a party to the proceedings’.

In my judgment, this submission may have been entertained if there was in fact a joint promise. There was none. Therefore there is no question of any implicit nomination of the Malaysian applicant company to bear liability under the Swiss contract; and

- (c) *lifting the corporate veil*. Mr Nagarajah cited a number of cases in support of his proposition that, ‘the corporate veil against the Malaysian company should be lifted’ in the event that DKSH Management is found to be the true employer of Mr Legler.

This submission fails for a number of reasons. First, a corporate veil is lifted or pierced to look behind the separate incorporation of company to its shareholders to hold the latter accountable for the acts of the former. Counsel for the respondent is asking the court to do the converse — to make the Malaysian applicant company liable for the obligations of its holding company. This is, and there is no delicate way of putting it, a non-starter.

The second flaw in the reasoning is that the signatory of the Swiss contract was not the holding company of the applicant. What counsel is effectively asking the court to hold is that a Malaysian subsidiary should be made liable, by lifting the corporate veil, for the obligations of its

A Swiss holding company that are contained in an agreement executed not by the holding company but by another related company. No more need be said on this point.

B [33] I now turn to the grounds upon which the applicant sought to set aside the award of the Industrial Court.

The point of pleadings

C [34] Counsel for the applicant argued that the Industrial Court, in finding that Mr Legler was jointly employed by both the applicant and DKSH Holding, had committed an error of law because joint employment had not been pleaded by Mr Legler in his statement of case.

D [35] I accept that the statement of case stated that the applicant was the employer and that the hearing had proceeded on this basis. Learned counsel also cited numerous authorities for the proposition that the Industrial Court, like the civil courts, must confine itself to the pleadings of the case and may only decide of the basis of a claimant's pleaded case. It is only necessary for the present purposes to refer to one of those cases. In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, Raus Sharif FCJ stated:

F [28] There is no doubt that the underlying objectives and purposes of the Act is to ensure social justice to both employers and employees and to advance the progress of industry by bringing harmony and cordial relationship between the parties and to eradicate unfair labour practices, to protect workmen against victimisation by employers and to ensure termination of industrial disputes in a peaceful manner (see *Tanjung Jara Beach Hotel Sdn Bhd v National Union of Hotel & Bar Restaurant Workers Peninsular Malaysia* [2004] 4 CLJ 657). However, as rightly pointed out by learned counsel for the respondent s 30(5) of the Act cannot be used to override or circumvent the basic rules of pleading. The Industrial Court, like the civil courts must confine itself to the four corners of the pleading. This had been held to be so by this court in *Rama Chandran* which are as follows:

H It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues.

I [29] There is no reason to depart from the above view. Pleadings in the Industrial Court are as important as in the civil courts. The appellant must plead its case and the Industrial Court must decide on the appellant's pleaded case. This is important in order to prevent element of surprise and provide room for the other party to adduce evidence once the fact or an issue is pleaded. Thus, the Industrial Court's duty, to act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form unders 30(5), does not give the Industrial Court the right to ignore the Industrial Court Rules 1967 made under the principle Act. Rule 9 provides as follows:

Statement of Case

- (1) Upon a case being brought before the Court, the Registrar shall immediately serve notice in Form H on one or other of the parties as the President shall direct to submit to the Court a Statement of Case.

[30] Rule 9(3) specifically prescribes the contents of a statement of case. It reads:

- (3) Such Statement of Case shall be confined to the issues which are included in the Case referred to the Court by the Minister or in the matter required to be determined by the Court under the provisions of the Act and shall contain:
- (a) a statement of all relevant facts and arguments;
 - (b) particulars of decisions prayed for;
 - (c) an endorsement of the name of the first party and of the first party and of his address for service; and
 - (d) as appendix or attachment, a bundle of all relevant documents relating to the case.

[31] The Court of Appeal has reproduced the applicant's statement of case in full in its judgment and found that the issue of victimisation was never pleaded. From the statement of case reproduced there is no doubt that the issue of victimisation was never pleaded. It was not a ground advanced by the appellant. As such the Industrial Court cannot act on a ground which was not advanced in a pleaded case. Section 30(5) of the Act cannot rescue the appellant's case.

[36] In the present instance, the existence of both the Swiss contract and the Malaysian contract had been referred to in the statement of case (see para 2 in exh JPC1 of encl 3). While it is true that the case before the Industrial Court had commenced on the basis that Mr Legler was an employee of the applicant, it is also trite law that only material facts need be pleaded. A claimant need not (and indeed should not) plead the law affecting his case, save that he may by his pleading raise a point of law. It is the function of the court to consider the legal consequences of pleaded facts, whether or not those consequences have been pleaded. In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283, the Federal Court permitted estoppel to be raised, even though it had not been specifically pleaded. The dicta of Gopal Sri Ram JCA (delivering the judgment of the Federal Court) is particularly instructive as to the three circumstances in which a court may permit an unpleaded point to be raised:

Now it is quite correct to state that courts have in their decisions identified estoppel as a matter which requires to be pleaded under the rules of court (see *Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287 at p 296). The operative rule is said to be O 18 r 8(1) of the Rules of the High Court 1980, although, in our view, r 7(1) of that Order is of equal importance

A because of the substantive law upon the subject of estoppel. These two rules read as follows:

B 7(1) Subject to the provisions of this rule and rules 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

C 8(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —

- D (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
- (b) which, if not specifically pleaded, might take the opposite party by surprise; or
- (c) which raises issues of fact not arising out of the preceding pleading.

E In our judgment, the requirement of these rules is sufficiently met if the material facts giving rise to the estoppel are sufficiently pleaded without actually using the term 'estopped'. (See, *Lal Somnath Singh & Ors v Ambika Prasad Dube* AIR 1950 All 121 at p 131.) It may be desirable for a pleader to use that term; but it is not fatal if he does not. One must not lose sight of the object of modern pleadings which is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308 at p 320.

F Thus, although courts, through their pronouncements, require estoppel to be pleaded, there is also judicial recognition of circumstances that may take a particular case out of the governing principle. First, there is the principle, already alluded to, that what requires to be pleaded are the relevant facts which a litigant claims to give rise to an estoppel and not any special formula in staccato: *Laws Holdings Pty Ltd v Short* (1972) 46 ALJR 563 at p 571.

G Secondly, even where a party has failed to set out the material facts in his pleading, but there is occasioned no surprise to his opponent, a court may, in the interests of justice, permit the point to be taken: *Coppinger v Norton* (1902) 2 IR 232 at p 243; *Co-operative Town Bank v Shanmugam Pillay* AIR 1930 Rang 265 at p 268; *Laws Holdings*. Useful reference may also be had to the instructive judgment of Edgar Joseph Jr J in *Rosita bte Baharom & Anor v Sabedin bin Salleh* [1992] 1 MLJ 379, affirmed by the Supreme Court in [1993] 1 MLJ 393.

I Thirdly, where there is no pleaded case of estoppel, but there is let in, without any objection, a body of evidence to support the plea, and argument is directed upon the point, it is the bounden duty of a court to consider the evidence and the submissions and come to a decision on the issue. It is no answer, in such circumstances, to say that the point was not pleaded: *Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1.

In *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650 at p 666; [1981]

1 WLR 1265 at p 1287, Oliver LJ dealt with an argument upon a point of pleading in the following way:

Finally, there was, says Mr Aldous, neither express allegation nor express proof that HBZ had acted upon the encouragement. There is certainly an allegation in relation to estoppel in para 15 of the defence that HBZ have relied upon the right to use their own name and motif and have been permitted by the plaintiffs to build up a goodwill therein. That goodwill, in fact, was amply proved by the banking documents and by HBZ's witnesses. I really cannot think that it was necessary formally to call a witness to say 'we did this in reliance upon the supposition that we were allowed to use our corporate name'. That reliance can be inferred from the circumstances as it was in *Greasley and others v Cooke* [1980] 3 All ER 710 (see the judgment of Lord Denning MR, at p 712) and I think that the judge was perfectly justified in inferring it from the evidence before him in this case.

It is to be emphasised that the categories of cases in which a court may permit an unpleaded point to be argued are not closed and that the foregoing three classes of cases are but mere illustrations of a much wider principle. It is this. A court may permit a litigant to argue that his opponent is estopped from raising a particular contention if it is in the interests of justice to do so. It is really a matter within the discretion of the particular judge who, when deciding where the justice of the case lies, must have due regard to all the circumstances of the case, including any injury or prejudice that may be caused by the affected party being taken by surprise. If a court comes to the conclusion that no injustice will be occasioned by permitting a party to raise estoppel as an issue, then, it may be justified in departing from the salutary rule contained in such decisions as *Haji Mohamed Dom v Sakiman* [1956] 1 MLJ 45 and *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 that imposes upon a judge the duty to strictly decide a case upon and only upon the issues raised in the pleadings and not upon an unpleaded case. Nevertheless, courts must ensure that the occasions upon which such a departure may be permitted are rare. For otherwise the rule which declares that a party is bound by its pleadings will be rendered meaningless.

That the justice of the case should be the overriding consideration is axiomatic. After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case. And rules of court and of practice are created to facilitate the attainment of justice, not its obstruction.

[37] In my judgment, the respondent had adequately pleaded the fact of the existence of the Swiss contract. The fact that the Industrial Court made the finding that Mr Legler was jointly employed by DKSH Holding and the applicant even though joint employment was not pleaded did not amount to error of law (leaving aside the point that the actual signatory of the Swiss contract was DKSH Management), as it was open to the learned chairman of the Industrial Court to make determinations on the legal effect or consequences of pleaded facts.

A JURISDICTION

[38] The applicant also sought to set aside the award of the Industrial Court on the basis that it was not seised with the jurisdiction to determine a matter involving a Swiss company, as the Industrial Relations Act 1967 does not confer extraterritorial jurisdiction on the Industrial Court.

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[39] The following passage from the Court of Appeal decision in *Multicore Solders (M) Sdn Bhd v Yeo Kuei Chwan Donny* [2012] 1 LNS 935 was quoted by counsel for the applicant in support of his arguments.

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[12] With respect, in our judgment, the Industrial Court ought not to have ruled on the second issue once it had determined that the proper employer was not before the court. Once the Industrial Court ruled that MSS was the employer of the respondent, in our judgment, it had no jurisdiction to go on and ask the question 'was there a dismissal'. We agree with the submission of the learned counsel for the respondent that the Industrial Court by doing so had been asking the wrong question; and this, with respect, in our view, amounts to Anisminic error. This is particularly so when the company which the Industrial Court found to be the employer is a company outside the jurisdiction of the court. As a result of asking the wrong question, the Industrial Court proceeded to make findings in favour of MSS, a Singapore company outside the jurisdiction of the court and which the Industrial Court had earlier ruled to be not the employer of the respondent. In our judgment, this amounts to Anisminic error because this finding is both irrational and unreasonable (see *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685; [1997] 3 CLJ 777).

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[40] In my judgment, the case of *Multicore Solders* can be distinguished on the basis that in that case, the Industrial Court went on to consider whether there had been a dismissal after holding that the proper employer was the foreign company. In the present case before us, the Industrial Court was of the view that both the Malaysian applicant company and DKSH Holding were the proper employers of Mr Legler (again, leaving aside the confusion between DKSH Holding and DKSH Management). The Industrial Court certainly did not lack the jurisdiction to determine who the proper employer was. Once it was ascertained that the proper employer was, or included, the Malaysian applicant company, it was open to the learned chairman to undertake the further query whether the dismissal was without just cause and excuse, at least in so far as it pertained to the Malaysian contract.

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[41] Learned counsel for the applicant submitted that the Industrial Court had come to a perverse decision in finding that Mr Legler was jointly employed by the Malaysian and Swiss companies. I cannot agree, as the dicta of Anantham Kasinather JCA quoted above shows that the Industrial Court may properly make the determination as to who was the proper employer. Of course, once the Industrial Court comes to the conclusion that the proper

employer was a foreign company, it may not then go on to consider whether there was dismissal, or whether such dismissal was without just cause and excuse.

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PURPORTED FAILURE TO EVALUATE EVIDENCE

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[42] Counsel for the applicant further argued that the Industrial Court had failed to take into account the testimony by Mr Legler that he was employed by DKSH Management and the testimonies of COW1 and COW3 to the effect that the decision to terminate the services of Mr Legler was taken by DKSH Holding.

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[43] In my judgment:

- (a) the finding by the Industrial Court that Mr Legler was jointly employed by one of the Swiss companies and the Malaysian applicant company was not inconsistent with the testimony of Mr Legler that his employer was DKSH Management; and
- (b) the fact that a decision to terminate an employee of a subsidiary company was made in consultation with the officers of a holding company does not necessarily mean that the employee must have also been an employee of the holding company. It is not uncommon for decisions affecting a group of companies to be escalated to the appropriate holding company even though the decision itself may need to be formally recorded as having been undertaken by the appropriate subsidiary.

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[44] Having considered the award in question in detail, I am not satisfied that the learned chairman had failed to consider the items of evidence identified by counsel for the applicant.

THE RESPONDENT'S PURPORTED ACRIMONIOUS AND CONFRONTATIONAL COURSE OF ACTION

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[45] The applicant alleged that the Industrial Court chairman committed an error of law when she did not take into account the purportedly acrimonious and confrontational course of action adopted by Mr Legler, both prior to suspension (through emails and conversations indicating his wish to move back to Switzerland) and following such suspension (through the correspondence conducted through Shook Lin & Bok, his solicitors).

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[46] Counsel for the applicant argued that, and I quote from the applicant's written submission:

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[The] Industrial Court had misconstrued the reason for the Respondent's termination which had been sufficiently established by the Applicant vide both

- A documentary and oral evidence. The basis for the termination must be considered in its totality considering the overall circumstances of the matter which ultimately led to the decision to dismiss the Respondent. In this present matter, the Industrial Court chose to view the Respondent's statement in isolation and disregarded his conduct prior and subsequent to making the statement to COW2. (see paragraph 59 of the Applicant's Written Submission).
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[47] In my judgment, the conclusion arrived at by the learned chairman in holding that the dismissal was without just cause and excuse was not, as alleged by counsel for the applicant, perverse, illogical and unreasonable.

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[48] The email correspondence and telephone conversations prior to his suspension indicated that Mr Legler took a direct approach in communicating his desire to return to Switzerland. While Malaysian employers may be unused to such a forthright method of communication, allowance should be made for the diverse range of cultural influences and individual behaviour. In my view, his conduct did not amount to an 'acrimonious and confrontational attitude'.

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[49] As for the post-suspension correspondence undertaken through Shook Lin & Bok: again I do not find that the conduct attributable to Mr Legler justified termination. It has to be borne in mind that Mr Legler had just been suspended from his job, which he had taken up in a country many thousands of miles away from his home. Given the gravity of the circumstances, it was not unreasonable for him to have firstly engaged solicitors and secondly to have put to the applicant his interpretation of events. Indeed, if he had failed to do so, I have no doubt that counsel for the applicant would have characterised his concerns as mere afterthought on account of his failure to raise them when the opportunity first arose.

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[50] For the reasons explained in the preceding two paragraphs, certiorari will not lie on the ground that the Industrial Court failed to take into account the totality of the evidence relating to the course of action undertaken by Mr Legler.

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[51] Even though the learned chairman did not view the conduct of Mr Legler as justifying his dismissal, she had nonetheless considered that he was partially responsible for the decline in good relations, and had rescaled the award down by 40% to take this into account. This to my mind indicated that the learned chairman had indeed considered the totality of the evidence before her.

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THE REJECTION OF THE TESTIMONY OF COW2

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[52] It was advanced for the applicant that the Industrial Court had erred in law in making the decision to reject the uncorroborated testimony of COW2 on the basis that he stood to gain from the dismissal of Mr Legler. Two reasons were put forward in support:

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- (a) first, the learned chairman who had delivered the award was not the same person who had heard the testimony of witnesses at trial, and as such the chairman — argued counsel for the applicant — was not in a position to evaluate the demeanour of COW2 during his testimony in court; and
- (b) the Industrial Court had taken into account irrelevant matters in coming to its finding, which amounted to an error of law.

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[53] In this case, the learned chairman before whom the trial had taken place had been transferred before the award had been handed down. With the consent of the parties, the reference was then transferred to another chairman, who had the unenviable task of sifting through the mass of trial bundles, notes of evidence and witness statements without the benefit of hearing the evidence first-hand, in order to come up with a decision under the award. In my view, as the applicant has agreed for the reference to be determined by a new Industrial Court chairman, it cannot now object to the findings of the chairman on the basis that she had not heard the *viva voce* testimonies of the witnesses.

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[54] The learned chairman was also perfectly entitled to take into account the interest and potential motives of a witness in evaluating the veracity of his or her testimony: see for example, s 8 of the Evidence Act 1950. This was accordingly a relevant consideration.

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[55] In my judgment, the conclusion arrived at by the learned chairman was not an unreasonable one, in the sense that no reasonable tribunal, similarly circumstanced, would have arrived at the decision made by the chairman. Accordingly, the application for certiorari on this ground also fails.

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CONCLUSION AND ORDERS

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[56] Faced with the formidable task of delivering an award without having first had the benefit of hearing the evidence in person, the learned chairman delivered a lucid and comprehensive award dealing with all the issues canvassed before her. Nonetheless, an error of law was committed when the Industrial Court held that the applicant and DKSH Holding were jointly and severally liable to Mr Legler. The Malaysian and Swiss contracts together did not constitute a single joint promise for joint liability to arise under ss 43 and 44 of the Contracts Act 1950. Rather, they were separate contracts that subsisted at

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A the same time up to the point of the termination of Mr Legler's services. As the Malaysian applicant company was not privy to the Swiss contract, the applicant should not have been made liable on the basis of a term in the Swiss contract that provided for continuous permanent employment.

B [57] As explained in paras 34–53 ante, the Industrial Court did not commit any error of law in holding that Mr Legler's services had been terminated without just cause and excuse. I accordingly uphold the award in this regard.

C [58] Where an employment contract was for a fixed term, the proper computation for backwages would be the salary that would have been paid for the unexpired duration of the contract, less deductions for payments made in lieu of notice. In this particular case, the Malaysian contract had seven months and week to run at the point of termination. Mr Legler was paid six months' salary in lieu of notice. Therefore the proper calculation for backwages payable should be:

$$RM90,720 + \left(RM90,720 \times \frac{31 - 24}{31} \right) = RM111,205.20$$

E The learned chairman of the Industrial Court had deducted 40% from the sum of backwages on account of the contributory conduct of the respondent. I see no reason to disturb this finding. The amount of backwages, after deduction, should be:

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$$RM\ 111,205.20 \times 60\% = RM66,723.12$$

G I therefore quash the original award for backwages calculated based on the maximum period of 24 months, and substitute for it an award in the amount of RM66,723.12.

H [59] I uphold the award with respect to the compensation in lieu of reinstatement (for the amount of RM181,440, being two months' salary, in view of the fact that Mr Legler had worked for two complete years).

[60] The total amount of the award would therefore be varied to the following:

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$$RM\ 66,723.12 + RM181,440.00 = RM248,163.12$$

[61] As I have allowed the application in part, I am of the view that this is an appropriate circumstance for there to be no order as to costs.

Application allowed in part and 24 months' back-wages award substituted with a sum of RM66,723.12. **A**

Reported by Ashok Kumar

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